Hong Leong Leasing Sdn Bhd v Far East Knitting Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-180-1995
KAMALANATHAN RATNAM JC
21 DECEMBER 1995

Contract *— Assignment — Factoring agreement — Creditor assigned debt to a factor — Notification by factor that credit notes must bear indorsement of factor to be valid — Dispute to be reported to factor within seven days assignment — Failure of debtor to pay factor — Allegation by debtor that goods supplied by creditor defective — No indorsement on credit notes — Whether good defence — Civil Law Act 1956 s 4(3)*

Equity *— Estoppel — Factoring agreement — Creditor assigned debt to a factor — Notification by factor that credit notes must bear indorsement of factor to be valid — Dispute to be reported to factor within seven days assignment — Failure of debtor to pay factor — Allegation by debtor that goods supplied by creditor defective — No indorsement on credit notes — Whether debtor estopped from asserting defective goods and relying on unindorsed credit notes*

The plaintiff entered into a factoring agreement with Beauty Industries Sdn Bhd ('the supplier') whereby the plaintiff agreed to factor and to be assigned the debts due under the invoices issued by the supplier to the defendant for goods sold. On each invoice, there was an indorsement stating that the account had been purchased by the plaintiff and any dispute must be reported within seven days of receipt. The plaintiff wrote to the defendant by letter of 4 October 1993 notifying it of the factoring agreement and the need for subsequent credit notes to bear the indorsement of the plaintiff to be binding. The defendant acknowledged the existence of the said agreement and confirmed the correctness of the debt. Pursuant to six invoices, the defendant owed the plaintiff a sum of RM390,449.63. As a result of non payment, the plaintiff commenced a civil suit and applied for summary judgment. The defendant contended that the goods were defective and had been returned to the supplier for which credit notes to the sum of RM390,449.63 were issued without the plaintiff's indorsement. The application for summary judgment was dismissed by the senior assistant registrar. The plaintiff appealed to the judge in chambers.

Held, allowing the appeal:

(1) A factor rests his claim in law on the premise that he would have a claim of ownership of the debt or debts which he had purchased. It is trite law that a debt is a chose in action and the way to acquire a right over a chose in action is by way of an assignment. In the case of a factoring agreement, an assignment is manifested when a creditor assigns a particular debt to a factor without even the need of a debtor's consent (see p 258F–G).

(2) One of the terms of the factoring agreement was that the plaintiff had the discretion to decide whether to purchase a particular debt and once the invoice was stamped with an indorsement, it was deemed to have been accepted by the plaintiff and a valid assignment constituted (see pp 261I and 262A). A

(3) As the defendants did not complain of the defective goods within the seven-day limit and there was no plaintiffs' indorsement on the credit notes, the defendants were estopped from asserting that there was nothing due on the invoices. There was thus clearly no triable issue (see pp 262E–G and 264A); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 followed. B C

[Bahasa Malaysia summary

Plaintif telah mengikat suatu perjanjian pemfaktoran dengan Beauty Industries Sdn Bhd ('pembekal') di mana plaintif bersetuju memfaktor dan untuk diserahhak hutang-hutang di bawah invois yang dikeluarkan oleh pembekal kepada defendan untuk barang-barang dijual. Di atas setiap invois, terdapat suatu pengindorsan menyatakan bahawa akaun itu telah dibeli oleh plaintif dan sebarang pertikaian mesti dilaporkan dalam tempoh masa tujuh hari selepas penerimaan. Plaintif telah menulis melalui surat bertarikh 4 Oktober 1993 memberitahu akan perjanjian pemfaktoran dan keperluan untuk nota kredit memaparkan pengindorsan plaintif mengikat. Defendan telah mengakui kewujudan perjanjian tersebut dan mengesahkan kebetulan hutang itu. Menurut enam invois, defendan berhutang sejumlah RM390,449.63 kepada plaintif. Oleh kerana defendan tidak membayar, plaintif telah memulakan suatu guaman sivil dan memohon untuk penghakiman terus. Defendan berhujah bahawa kualiti barang-barang itu tidak elok dan telah dipulangkan kepada pembekal dan nota kredit bagi jumlah sebanyak RM390,449.63 telah dikeluarkan tanpa pengindorsan plaintif. Permohonan untuk penghakiman terus telah ditolak oleh Penolong Kanan Pendaftar. Plaintif merayu kepada hakim dalam kamar. D E F G

Diputuskan, membenarkan rayuan itu:

(1) Seseorang faktor berdasarkan tuntutannya dalam undang-undang atas premis bahawa dia akan mempunyai tuntutan pemunyaan hutang atau hutang-hutang yang dia telah membeli. Adalah merupakan undang-undang mantap bahawa suatu hutang adalah satu hak dalam tindakan dan cara untuk memperolehi suatu hak ke atas hak dalam tindakan ialah menerusi penyerahhakan. Dan dalam suatu kes perjanjian pemfaktoran, suatu penyerahhakan dapat dilihat dengan jelas apabila si piutang menyerahhak suatu H I

A hutang khusus kepada suatu faktor tanpa keperluan persetujuan penghutang (lihat ms 258F–G).

(2) Salah satu daripada terma perjanjian pemfaktoran adalah bahawa plaintif mempunyai budi bicara untuk menentukan sama ada untuk membeli sesuatu hutang khusus dan sebaik sahaja invois B dicapkan dengan suatu pengindorsan, ianya dianggap telah diterima oleh plaintif dan satu penyerahan hak yang sah telah dibentuk (lihat ms 261I dan 262A).

(3) Oleh kerana defendan tidak mengadu tentang barang-barang rosak dalam tempoh masa tujuh hari dan tiadanya pengindorsan C plaintif atas nota kredit, defendan diestop daripada menyatakan bahawa tiada apa-apa yang terhutang atas invois. Justeru itu, adalah jelas tiada sebarang isu untuk dibicarakan (lihat ms 262E–G dan 264A); *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 diikut.]

D

Notes

For cases on assignment, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1153–1174.

For cases on estoppel, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1542–1548. E

Cases referred to

Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd [1994] 1 MLJ 624

Arab-Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc [1992] 2 CLJ 989 F

Arab-Malaysian Merchant Bank Bhd v Sin Hiap Huat Enterprise (sued as a firm) [1989] 2 CLJ 980

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331

G *Matang Factoring Sdn Bhd v Fong Miang Seng & Ors* (Civil Suit No C–23–2024–88) (unreported)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268

H **Legislation referred to**

Civil Law Act 1956 (Act 67) s 4(3)

Rules of the High Court 1980 O 14

Gregory Chan (*KC Yap Kamaludin & Partners*) for the appellant/plaintiff.

I *Joseph J Fernandez* (*JF Joseph & Partners*) for the respondent/defendant.

Cur Adv Vult

Kamalanathan Ratnam JC: The plaintiffs entered into a factoring agreement dated 4 October 1993 (hereinafter referred to as 'the said agreement') with one Beauty Industries Sdn Bhd (hereinafter referred to as 'the supplier') whereby pursuant to the said agreement the plaintiffs agreed to factor and to be assigned the debts and invoices (hereinafter referred to as 'the debt receivables') due to the supplier from the defendants. The supplier had supplied to the defendants various raw materials by way of six invoices amounting to RM390,449.63 made up as follows:

	Invoice No	*Date*	*Amount*
1	BI/0739	13.9.93	RM 52,167.68
2	BI/0784	22.9.93	RM 79,291.43
3	BI/0807	27.9.93	RM 40,708.58
4	BI/0859	11.10.93	RM 41,006.52
5	BI/0886	18.10.93	RM 84,416.56
6	BI/0908	25.10.93	RM 92,858.86
	Total		RM 390,449.63

Each of the six invoices had on them the following endorsement:

> This account has been purchased by Hong Leong Leasing Sdn Bhd pursuant to a Factoring Agreement who is alone authorized to give a valid discharge of the sum due. Remittance is to be made directly to
>
> Hong Leong Leasing Sdn Bhd
> 10.2, (2nd Floor), Jalan Maju
> Taman Maju Jaya 80400
> Johor Bahru, Johor
>
> Any dispute against this bill or its terms must be reported to them within seven days of receipt.

In addition to the endorsement referred to herein the plaintiffs had, vide their letter dated 4 October 1993, informed the defendants of the said factoring agreement and requested the defendants to confirm in writing that the particulars of all existing debt receivables as of 4 October 1993 annexed to their letter, were correct. The said letter also had a warning that any subsequent credit notes issued by the supplier to the defendants after 4 October 1993 should bear the plaintiffs' endorsement to be binding on them. The defendants acknowledged the existence of the said agreement and confirmed the correctness of the debt receivables as at 4 October 1993. The total amount due as on 4 October 1993 was RM326,321.40. To be doubly sure, the supplier also sent a letter dated 4 October 1993 to the defendants confirming the said agreement and requesting that all payments be made to the plaintiffs. The supplier's letter clearly and unequivocally spelt out that they had assigned the invoices totalling RM326,321.40 to the plaintiffs.

When the defendants failed to pay the total outstanding sum of RM390,449.63 as at 31 May 1994 and interest at 8% from 1 January 1994, the plaintiffs sent a notice of demand to the defendants dated 29 March 1995 through their solicitors requesting full settlement and in the said letter the six invoices were itemized.

When the defendants still failed to pay, the plaintiffs sued for the said sum and forthwith issued out an application for summary judgment and in their supporting affidavit all the invoices and letters referred to herein were exhibited.

The defendants vide their affidavit-in-reply denied owing the said sum of RM390,449.63 as at 31 May 1994. However, they admitted to having knowledge of the said agreement and to being a customer of the supplier. However, they averred that at all material times there was an understanding between them and their supplier that the raw materials supplied to them were of good quality and fit to be used for making cloth and for knitting and that the raw materials would be returned to the supplier if the same were found otherwise. The defendants averred that the raw materials that were supplied, and for which the said claim of RM390,449.63 was made, were found to have been damaged and had colour shading and were thus unfit for the intended use and were therefore to be returned to the supplier. The discovery that the raw materials were damaged and unfit for use was made as soon as possible. The supplier had repurchased the damaged raw materials and had issued out credit notes for the total sum of RM390,449.63. The said credit notes as exhibited in the affidavit-in-reply are reproduced hereunder:

	Credit Note No	*Invoice*	*Date*	*Amount (RM)*
1	BISB/FE/001/93	BI/0739 BI/0784 BI/0807	15.11.93	172,167.69
2	BISB/FE/002/93	BI/0859	20.11.93	41,006.52
3	BISB/FE/003/93	BI/0886 BI/0908	29.12.93	177,275.42
	Total			390,449.63

The defendants further exhibited a letter dated 25 March 1994 (which was alleged to be in response to a letter from the plaintiffs dated 22 March 1994) which showed that the defendants had informed the plaintiffs of the return of the said damaged goods to the supplier. The defendants then sent another letter to the plaintiffs dated 19 July 1994 wherein they contended that:

'The delay in notification is due to the time consuming process of converting raw fabrics into finished products and discovering the problem only at the last stage of the process.'

The defendants thus contended that they had raised sufficient triable issues.

The said O 14 application for summary judgment was heard and dismissed by the learned senior assistant registrar ('SAR') on 3 August 1995, and hence this appeal before me.

It is noteworthy that whilst the supplier has arbitrarily given a credit note based on a refund of goods worth RM172,167.69 on 15 October 1993 on the basis that the said goods were damaged and not fit for use, yet on 18 October 1993 and on 25 October 1993, the supplier had further supplied the same type of goods for RM84,416.56 and RM92,858.86 respectively, and the defendants had accepted the same without protest. Since on 15 October 1993 it had become clear to the defendants that the raw materials were damaged and not fit for use necessitating it to be returned, surely not just business sense but common sense dictates the need to examine the goods within the seven days allowed for reporting any dispute against the bill or its terms and if found defective to return the same or to vehemently lodge a protest with the plaintiffs. Yet nothing was done. Yet again, if there was indeed in existence such a tacit understanding between the supplier and the defendants that defective and/or unfit goods could be returned, neither party informed the plaintiffs of the same. No explanation was proffered as to why the defendants were able to only discover 'at the last stage of the process' that there was colour shading and/or that the raw materials were damaged.

The Factoring Agreement

The relevant provisions of the said agreement are as reproduced below:

4 Mode Of Purchase

4.1 The Supplier shall at weekly intervals submit to the Factor a list of all debts of approved customers which the Supplier offers to sell to the Factor, and in making such offers the Supplier shall not withhold from the Factor any debts of approved customers, together with the original and one copy of each invoice, the original signed delivery orders and such other documents which evidence the due performance of a contract as the Factor may require as well as the originals of all credit notes proposed to be issued by the Supplier to any approved customer and copies of all credit notes already issued by the Supplier to any approved customer where such credit note is mentioned in any Supplier's invoice offered to the Factor. Every such list of debts shall be in a form required by the Factor and shall contain such details as the Factor shall require.

4.2 The Factor may at its discretion accept any of the debts offered by the Supplier by communicating its acceptance (verbally or otherwise) to the Supplier. Upon the Factor's acceptance of the debts offered by the Supplier the said debts accepted by the Factor shall be deemed to be purchased by the Factor and as from that day all rights and interest of the Supplier in respect of every debt so included and all remedies for enforcing the same including any rights of lien stoppage in situ or other rights arising in favour of the Supplier as unpaid seller in relation to any goods in respect of which the debt has been contracted as well as the benefit of all associated securities for or in respect of the debt shall be deemed to have been equitably assigned to the Factor by the Supplier.

Coupled with the above term is the clear endorsement on each of the six invoices which had, in plain words, stated that the plaintiffs are the factors and that they alone could give a valid discharge of the sum due and that any dispute regarding the bill ought to be conveyed to the plaintiffs within seven days of receipt of the items. In addition and in response to the plaintiff's request, the defendants herein had unequivocally endorsed that all debts owing were correct. But, most important of all, the defendants were put to fair notice that any credit note to be valid must have the plaintiff's endorsement to be binding on them. The other relevant clauses are as set out below:

6 Purchase Price

6.1 The purchase price for every purchased debt shall be the gross price less:

(i) any discount rebate commission, credit note or other allowance which the Supplier has allowed the Customer and as shown on the Supplier's invoice; and

(ii) a Factoring Charge.

6.2 Payment of the purchase price for each purchased debt shall be due and made at the time and in the manner as specified in cl 8 hereof subject to the right of debit and rights of retention and set-off as therein provided but shall in no event become due prior to receipt of the purchased debt in full by the Factor from the customer.

8 Right Of Retention

8.1 Subject to the provisions hereof the Factor may at any time in its sole discretion remit to the Supplier or to its order an initial payment or any part of the balance for the time being standing to the credit of the Supplier in the Current Account up to the full amount thereof less any amount which the Factor shall in its absolute discretion decide to retain as security for: (i) any claims or defences on the part of any customer or the Supplier or any other person which have arisen or may arise against the Factor; (ii) any risk of non-payment by any customer; and (iii) any amount prospectively chargeable to the Supplier as a debit under cl 7(ii) hereof. Any balance for the time being standing to the debit of the Supplier in the Current Account shall be payable by the Supplier to the Factor on demand.

8.2 The Factor shall not be bound to remit any further initial Payments to the Supplier where the total of the initial Payments already remitted to the Supplier exceeds either:

(i) the sum set out in item 3 of the Schedule hereto or such other sum or sums as the Factor may in its absolute discretion specify; or

(ii) the percentage specified in item 3 of the Schedule hereto of the total of the sums outstanding from time to time on purchased debts or such other percentage rate or rates as the Factor may in its absolute discretion specify.

9 Supplier To Give Notice To Customers And Executive Legal Assignment

In relation to every purchased debt the Supplier shall at the Supplier's own cost:

(i) at the request of the Factor, give to the customer whose debt has been purchased a notice in a form approved by the Factor that the debt has been assigned to the Factor;

(ii) execute a legal assignment of the debt to the Factor together with the benefit of all guarantees or other securities for or in respect of the same;

(iii) accord to the Factor all such assistance as may be necessary to enable the Factor to recover the debt.

It is clear, therefore, from the terms of the said agreement that the factor, ie the plaintiffs, have the discretion to accept any of the debts. But once a debt offered is accepted, it is deemed assigned.

A factor rests his claim in law on the premise that he would have a claim of ownership of the debt or debts which he had purchased. In this way he is able to recover the money he had expended towards his clients in purchasing the debts. The right of the factor based on the factoring agreement is to be able to recover his full purchase price less any discounts already agreed to by the supplier and less the factoring charges. It is trite law that a debt is a chose in action and the way to acquire a right over a chose in action is by way of an assignment. And in the case of a factoring agreement, an assignment is manifested when a creditor assigns a particular debt to a factor without even the need of the debtor's consent.

If an assignment is formalized based on any statutory provision, it becomes a legal assignment as opposed to other forms of assignments recognized in equity. In Malaysia, legal assignments are governed by s 4(3) of the Civil Law Act 1956, which reads:

4(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities

> which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

In support of his case, Mr Joseph Fernandez for the respondents relied on *Arab-Malaysian Merchant Bank Bhd v Esso Production Malaysia Inc* [1992] 2 CLJ 989, which was also a case dealing with a factoring agreement. The learned judge therein held that it was implicit in the factoring agreement that the assignment ought to be done by a separate act as the factoring agreement itself did not constitute an assignment of the debts. He also held that since the factoring agreement was a 'facultative agreement' — meaning that although the supplier was bound by the factoring agreement to offer every debt arising from sales in the normal course of its business — the factor may accept or decline to accept any debt. In the circumstances, the learned judge therein was persuaded by counsel's argument that since there was no indication as to which particular invoiced debt had been allegedly assigned — as not all the invoices had been endorsed with the notice of assignment and as the factor had an absolute discretion as to which of the debts he wished to accept — there was, therefore, no proper assignment. The learned judge further went on to hold that, even assuming that the assignment was valid, it amounted to an equitable assignment of a legal chose in action and the plaintiff could not bring the present action unless the supplier/assignee was added as a party. See *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (FC). The learned judge also held that the legend, which was a printed endorsement on the invoices indicating the assignment of the debt by way of the factoring agreement, served only as a notice of assignment and that pursuant to s 4(3) of the Civil Law Act 1956, there needed to be an assignment in writing under the hand of the assignor.

On the other hand, in *Arab-Malaysian Merchant Bank Bhd v Boustead Trading (1985) Sdn Bhd* [1994] 1 MLJ 624, Abdul Malek J (as he then was) had to consider at trial, a similar situation as in the instant case where the supplier's (Chemitrade's) invoices were endorsed with the notice of assignment from Chemitrade to the plaintiff. The plaintiff, who was the factor, had applied for summary judgment against the defendant, who was the customer for the sum of RM391,832.52 with interest. The learned SAR dismissed the said application and the plaintiff appealed. The learned judge allowed the appeal in part with regard to the undisputed amount of RM93,431.75 but ordered that the claim for the balance of RM298,400.78 should go for trial.

It was argued before the learned judge as a preliminary issue that as the relevant factoring agreement did not constitute an assignment of the debt which should have been by a separate act of assignment, and not

through mere notification by way of the relevant correspondence and the endorsements on the pertinent invoice, the plaintiff had no cause of action against the defendant. The learned judge held that even if this preliminary issue had been raised before him during the O 14 stage it would have, at most, served as a triable issue. In his judgment after trial, the learned judge held that the factoring agreement constituted the actual assignment of the supplier's book debts to the plaintiff and the letter of notification sent to the defendant by the plaintiff constituted the acceptance of the specific debts. The defendant argued that cl 18 of the factoring agreement had not been complied with by the plaintiff. Clause 18 in that case was to the effect that whenever requested by the plaintiff, the supplier at its own cost was to execute, stamp, and deliver to the plaintiff a deed assigning to the plaintiff any purchased debt. The learned judge held that the factoring agreement did not make cl 18 mandatory and rejected the defendant's submission.

The defendant had a 14-day period within which to dispute the relevant invoices and to notify the plaintiff which they did not. On this aspect, the learned judge had this to say at p 633:

> In relation to the shrink wrapped goods, the defendant was fully aware of the factoring agreement from the two letters of notification to them from the plaintiff and Chemitrade (the supplier) respectively, and from the endorsements on the invoices which served as notices for the assignments of the debts. If there was any dispute or discrepancy, the defendant should have notified the plaintiff then and not just simply ignored the plaintiff's vested rights. By the defendant's silence, the plaintiff was led to carry on the purchase of the subsequent invoices from Chemitrade in the belief that they were good for payment. In fact, the endorsements clearly state that any objection must be made within 14 days.

In like fashion, the defendants in the instant case had seven days from the date of receipt of the invoice to dispute the invoice or its terms, if any, to the plaintiffs.

The decision of Abdul Malek J was appealed against and the Federal Court's decision on the appeal and cross-appeal was reported in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. Having reviewed the facts, Gopal Sri Ram JCA, in delivering the judgment of the Federal Court, applied the doctrine of estoppel against the defendant. He said at p 348:

> A close examination of the evidence shows that the instant appellant did not merely remain silent, as contended by counsel on its behalf. This is what actually happened. The appellant received from the respondent invoices of Chemitrade bearing upon them the rubber stamped indorsement specifying the 14-day limit for objections. Now, the appellant at that stage had a choice. It could have told the respondent that the 14-day limit was part of the original arrangement, that this amounted to an abrogation of its rights and that it was not prepared to be bound by the limitation. But it did nothing of the sort. It did not merely remain silent. It actually made payments on those very invoices without any protest. A reasonable man

similarly circumstanced as the respondent would have been entitled to assume, as the respondent did, that the appellant was agreeable to the imposition of the 14-day limit. Influenced — and we use that term deliberately — by the conduct of the appellant, the respondent paid out on those very invoices. This the respondent would not have done had the appellant protested. The appellant's attempt to raise this point some seven months later, well after the respondent had paid out its money to Chemitrade, must, in our judgment be classified as unconscionable and inequitable conduct. It ought not, therefore, to be permitted to question the validity of the indorsement.

Much, if not all, of what we have said upon the effect of the indorsement applies with equal force to the complaint directed at the impugned invoices in respect of which the appellant says there was nothing due to Chemitrade. Again, we have the cumulative effect of the evidence pointing to the appellant's silence during the 14-day period. At the end of that period, the respondent, who was unaware of the cautionary statement appearing on the face of the appellant's purchase orders, made payment of the percentage that was due to Chemitrade. It was entitled to assume that the invoices were good for payment because the appellant had done nothing to disabuse the respondent of the impression it had created in the latter's mind that the invoices were good for payment. It would be most unjust for the appellant to now suggest that the respondent ought not to have paid on the disputed invoices. The appellant should therefore be estopped from asserting that nothing was due on these invoices.

On the issue of whether the factoring agreement itself constituted an assignment, Gopal Sri Ram JCA had this to say at p 349:

> In the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade and the respondent proceeded upon the assumption — an erroneous assumption of law — that the factoring agreement was indeed a good and valid assignment.

However, the Federal Court held that since the factor had written to the defendant stating that there had been an assignment under the factoring agreement and since the defendant had failed to dispute the construction that the factor had placed upon the agreement but chose to go along with the factor's interpretation of the document, it was unjust and unconscionable to permit the defendant to now challenge the meaning which the parties had chosen to give to the said document.

The Federal Court held, based on that particular case, that the assumption that the factoring agreement was a good and valid assignment, was an erroneous assumption of law. However, from a careful study of the judgment, it would appear that the 'rubber stamped indorsement' or the legend on the invoice may well constitute such an assignment. In the instant case, one of the terms of the said agreement was that the plaintiffs have a discretion to decide whether or not they want to purchase a particular debt and once the invoice is stamped with an indorsement, it is deemed to have been accepted by the plaintiffs and a valid assignment

constituted. Hence, I hold the defendants liable to the plaintiffs for the sum claimed.

Should the above view be found to be wrong, I would still allow the plaintiffs' claim on the basis of the Federal Court decision in *Boustead Trading* on estoppel. I must say that the decision of the Federal Court in *Boustead Trading* stands out like the mighty Colossus straddling the shores of the doctrine of estoppel. I fully adopt those principles to the instant case. The plaintiffs and the supplier had informed the defendants of the existence of the factoring agreement and the relevant indorsement had been made on each of the invoices issued to the defendants. Applying the principles as held by the Federal Court, it was open at that stage for the defendants to dispute the construction which the plaintiffs and the supplier had placed upon the said agreement, and having failed to do so, the defendants cannot now complain.

At para 5 of their affidavit-in-reply, the defendants confirm knowledge of the existence of the factoring agreement. The defendants have never denied receipt of the goods referred to in the six invoices. Their defence is that the goods were damaged and were, therefore, returned to the supplier for which they had been issued with credit notes amounting to RM390,449.63. It was clear from a perusal of the credit notes exhibited that these credit notes did not contain any endorsements by the plaintiffs which, as stated earlier, was a requirement for the credit notes to be binding on the plaintiffs. The plaintiffs were also not informed of the damaged goods within the required time frame agreed to by the parties. Had the time frame been inadequate in that — as alleged by the defendants — it could only be discovered at the last stage of the process of converting raw materials into finished products, the defendants ought to have protested against the time frame given. Instead, they agreed to it and this had led the plaintiffs to continue purchasing the supplier's invoices thinking that all was well. Hence, as decided by the Federal Court in *Boustead Trading*, the defendants should therefore be estopped from asserting that nothing was due on the invoices.

In *Arab-Malaysian Merchant Bank Bhd v Sin Hiap Huat Enterprise (sued as a firm)* [1989] 2 CLJ 980, which was also an appeal by the plaintiff against the refusal to grant summary judgment on an O 14 application by the learned SAR based on a factoring agreement, the defendants in their affidavit raised two issues, ie that the nature of the goods purchased was not suitable for their line of business and secondly, the cashier who received the goods had no authority to do so and had in fact conspired with one of the directors of the suppliers, Fung Yen, by forging the defendant's signature and thus contended non-delivery of the goods as the acknowledgments of receipt were fictitious.

In her judgment, Siti Norma Yaakob J (as she then was) held that the issue of the nature of the goods had no bearing on the defendant's liability as all that the plaintiff had agreed to in the factoring agreement was to purchase the supplier's book debts which was the basis of the credit factoring agreement.

With regard to the next issue of fraud, Siti Norma Yaakob J held that this again was of no concern to the plaintiffs as they were not parties to the fraud. The learned judge decided this issue simply on the premise that since the plaintiff's cause of action was founded on the factoring agreement, the law is that the customer's duty to pay the factor arises when he receives notice of the assignment and as from that moment if he ignores such a notice, he does so at his peril and he must regard the factor as his creditor so far as the assigned debt is concerned. Since the letter of notification had been acknowledged as having been received by the defendant, they were bound by the same even if the alleged letter bore a forged signature. Their liability, she found, arose upon receipt of the letter of notification.

It was also argued before her, though very fleetingly, that the supplier, ie the assignor, ought to have been sued under a clause in the factoring agreement instead, for the said debt. The learned judge brushed aside the argument on the basis that the defendant, being a stranger to the agreement, could not rely on the factoring agreement.

It is most unfortunate that this reported case was never referred to by either counsel to the Federal Court. The need for counsel to assist a court in its deliberations by providing the said court with all current relevant and related authorities so that all aspects of the case could be looked into, more so when arguing a case on an appeal, ought to be firmly entrenched in the heart and mind of every practitioner.

In an unreported case on a claim made by a factor as the plaintiff against the customers as defendants, *Matang Factoring Sdn Bhd v Fong Miang Seng & Ors* (KL High Court Civil Suit No C-23-2024-88) decided on 18 July 1988, VC George J (as he then was) also decided the case on estoppel. He held at p 4 of his judgment as follows:

> The fourth defendant Heap Chee Heng Sdn Bhd may have a claim against the vendor of the goods for purporting to meet their obligations by delivering goods not up to specifications. However, their liability as against the plaintiff was established on their acknowledgment on the copy of the invoices that the goods were received in good order and their not within 14 days or in any event within a reasonable time, informing the plaintiff of the fact that the goods were rejected. Not having done so the fourth defendant is now estopped from saying vis-a-vis the plaintiff factor that the goods were not up to specifications or in any event were rejected.

In the light of the decision of the Federal Court, it is quite appropriate and indeed well-founded that the doctrine of estoppel should bind the defendants

in the present appeal before me. There is clearly no triable issue and the learned SAR was wrong to dismiss the O 14 application of the plaintiffs.

I therefore allow the appeal and set aside the order of the learned SAR dated 3 August 1995. I enter judgment for the plaintiffs in the sum of RM390,449.63 with interest at 8% from 1 June 1994 as prayed and costs to be agreed or taxed.

Order accordingly.

Reported by Ringo KL Low